BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASON WADE MOORE Claimant VS. **DALE PATRY MASONRY** Respondent AND **STATE FARM FIRE & CASUALTY** Insurance Carrier	)	Docket No. 193,365

ORDER

Claimant appeals from the Preliminary Order entered by Administrative Law Judge John D. Clark on November 1, 1994, denying all benefits.

ISSUES

(1) Whether claimant's injury arose out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issue raised on appeal, i.e. whether claimant's injury arose out of and in the course of his employment, is one listed in K.S.A. 44-534a as an issue which the Appeals Board has jurisdiction to review on appeals from preliminary orders.

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds that claimant has not proven by a preponderance of the credible evidence that his injury arose out of and in the course of his employment.

K.S.A. 44-501(a) states in part:

> "If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the

> burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

"Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case." See Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); and, Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979).

The Kansas Supreme Court has held that for an accident to arise out of the employment some causal connection must exist between the accidental injury and the employment. Siebert v. Hoch, 199 Kan. 299, 428 P.2d 825 (1967).

Claimant was employed by respondent as a brick tender. On the date of his accident he was constructing a chimney at a residential home site. His accident occurred when he borrowed a three-wheeler motorcycle from the employee of another contractor on the job site and while riding it in a pasture adjacent to the job site he lost control of the vehicle and fell off.

It is uncontroverted that the three-wheeler did not belong to claimant's employer nor that it was in any way used for any purpose connected with claimant's employment. The date of accident was the first and only time the three-wheeler had been brought to the job site. Claimant admitted that at the time he rode the three-wheeler he had ceased working and was waiting for two other workers to join him for lunch.

The Appeals Board finds that there was no causal connection between the accidental injury and the claimant's employment with respondent. Accordingly, the claimant's injury did not arise out of his employment and is not compensable. Although there was some testimony to the effect that horseplay was occasionally engaged in by claimant and by his supervisor, Dale Patry the owner of the respondent company, from the evidence presented we cannot say that horseplay had grown into a habit or a custom on the work site. With regard to the specific incident of riding a three-wheeler, the evidence is uncontroverted that this was an isolated incident, claimant had only ridden it on the date of his injury and that the three-wheeler had never been present at the work site before that date.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge John D. Clark, in his Preliminary Hearing Order dated November 1, 1994, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Bryce A. Abbott, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director